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No. 95-1514

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

October Term, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CALIFORNIA'S REPLY BRIEF

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CALIFORNIA'S REPLY BRIEF

ARGUMENT

I. Respondents Continue to Ignore the Fundamental Rights of Millions of American Citizens

Remarkably, respondents continue to ignore the crux of California's argument, neither mentioning nor disputing that the FCC's preemption order strips privacy protection from millions of nonpublished customers who will be *unaware* of CPN disclosure and blocking. Respondents' statement that "[a]ny caller can prevent disclosure of its telephone number via caller ID, either by choosing per line blocking or by dialing the appropriate prefatory numbers to block transmission of its CPN on individual calls," Opp. 10, is disingenuous at best. In the face of California's undisputed, unrebutted evidence, respondents' assumption that *all* callers will know how to protect their privacy is demonstrably false.[1]

II. The Questions Presented are Exceptionally Important

Respondents' argument that the questions presented are not of "recurring importance," Opp. 6, is simply wrong. The Court has never addressed whether principles of federalism preclude the FCC from preempting under the Communications Act state laws seeking to protect the public health,

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[1] Respondents also argue that "[e]ven if telephone subscribers possessed a constitutional right to prevent transmission of their telephone numbers, . . . [f]ailure to utilize either of those options effects a waiver of any conceivable right to prevent disclosure of CPN." Opp. 10. This argument runs afoul of the Court's repeated admonition that acquiescence in the loss of fundamental rights may not be presumed. *Johnson v. Zerbst*, 304 U.S. 450, 464 (1938), *citing Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 301 U.S. 292, 307 (1937).

safety and welfare. Moreover, the Court's resolution of this issue would obviously have a strong bearing on the FCC's ability to preempt state regulation in related contexts.[2]

The individual rights issues raised by this case are equally important. The Court has never determined whether, in the absence of a strong justification by the government, the governmentally-compelled disclosure of personal and identifying information which the speaker chooses not to reveal violates the First Amendment right not to speak or the First Amendment right to speak anonymously.[3] Similarly, the Court has not determined whether the government, without strong justification, may compel the disclosure of a citizen's nonpublished telephone number consistently with the citizen's right to the privacy of personal information.[4] The Court's resolution of these questions will significantly advance the

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[2] For example, may the FCC preempt state restrictions on abusive and fraudulent practices by telemarketers? May it preempt state laws authorizing parental blocking of calls to 900 numbers, such as telephone sex lines? May it preempt state zoning restrictions on the placement of personal communications services ("PCS") towers in public schoolyards, parks or heavily populated areas, particularly if the state found hazards to the public health or safety engendered by such towers?

[3] If the First Amendment only prohibits the compelled assertion of an ideological message and not the compelled disclosure of personal factual information, as respondents and the Ninth Circuit have suggested, it would presumably be permissible for the government, without significant justification, to compel a citizen to disclose to the general public her social security, credit card or bank account numbers, that her mother was an alcoholic, that her brother had AIDS, or that she was convicted of shoplifting as a teenager.

[4] The Court has found an enforceable privacy interest in names, home addresses and rap sheets. *Dept. of State v. Ray*, 502 U.S. 164 (1991); *DOD v. FLRA*, 510 U.S. ___, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994); *DOJ v. Reporters Committee*, 489 U.S. 749 (1989). There would appear to be no less an interest in nonpublished telephone numbers. *See Katz v. United States*, 389 U.S. 347, 351-352 (1968); *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

content and scope of its negative free speech and informational privacy jurisprudence.

Moreover, the Court's resolution of the questions presented is of immense importance to the millions of citizens whose rights and expectations will be violated without their knowledge and consent if certiorari is denied. A denial of certiorari would cause the names, addresses and nonpublished telephone numbers of countless California citizens to be placed on telemarketing lists, direct mail marketing lists and other databases to be sold without limitation to individuals and businesses. It would cause many citizens repeatedly to receive intrusive, unwanted, annoying, harassing or exploitative contacts in their homes from individuals and businesses with access to those databases. And in some cases, it would provide information concerning their whereabouts to those who might seek to harm them. These concerns were acknowledged not only by the CPUC in its Caller ID decision, Pet. App. A190-A191, but also by the FCC in its decision below, *id.* at A150. That is why California is supported in this appeal by the nationwide association for social workers, major domestic violence victims groups and major consumer groups. Pet. ii.[5]

Respondents portray this as a one-state case, Opp. 6, but their view is too formalistic. Instead, the Court should concern itself with the significance of the issues, in the sense of how many people these questions affect. California's sixteen

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[5] Citizens facing such harm will include celebrities, public officials, CEOs, judges and civil servants, as well as victims of domestic violence and other forms of harassment, who are legitimately concerned about protecting their privacy and safety. They will include psychiatrists, psychotherapists, lawyers, doctors, social workers, parole officers, probation officers – people who make calls to potentially dangerous clients, patients and supervisees from their homes. And they will include particularly vulnerable people, such as the elderly, the disabled, the sick, the limited-English-speaking and children – people who are particularly entitled to have protection from exploitation.

million citizens living in households with nonpublished numbers constitute more people than the populations of the states of Alaska, Delaware, Hawaii, Idaho, Maine, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Utah, Vermont and Wyoming *combined*, according to the 1990 census. *Compare Cooper v. Oklahoma*, ___ U.S. ___, ___ n. 16, 64 U.S.L.W. 4255, 4259 n. 16 (No. 95-5207 Apr. 16, 1996) (in which the Court properly granted certiorari to correct the unfair standard of proof for competency hearings in four states, though *only thousands* of criminal defendants will be subjected to such hearings in those states for the foreseeable future); *Patterson v. Lamb*, 329 U.S. 539, 541 (1946) (one-time ruling affecting the status and claims of *thousands* of draftees "called for our review"); *Scott v. Williams*, 434 U.S. 910 (1977) (opin. of White, J.) (observing that an important issue "which significantly affects a great number of persons" satisfies "normal standards governing the exercise of our certiorari jurisdiction").

III. Respondents Understate the Importance of the Federalism Question by Misrepresenting *Louisiana* and the Statutory Scheme

Arguing that this case fits neatly within the "impossibility exception" of *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n. 4 (1986), respondents contend that California's federalism claim must fail because "the interstate and intrastate aspects of the [FCC's] regulatory scheme cannot be separated." Opp. 5, 6. What respondents overlook is that California's privacy regulation is different *in kind* from the *economic* regulation of interstate telecommunications which Congress delegated to the FCC.

This Court has repeatedly made clear that state regulation of the public health, safety and welfare, even where such

regulation incidentally affects interstate commerce, is categorically distinct from impermissible state regulation of interstate commerce.[6] As the Court recently said in *West Lynn Creamery v. Healy*, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 157, 175 n. 21 (1994), *quoting H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949): "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden, or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."

The Court has also stated: " 'The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community.' When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of [the state]." *Breard v. Alexandria*, 341 U.S. 622, 640 (1951), *quoting Kovacs v. Cooper*, 336 U.S. 77, 83 (1949).

Thus, even assuming that Congress has the power to authorize the FCC to override a state's protection of the privacy rights of its citizens, a matter traditionally left to the states, Congress's legislative intent to do so must be unmistakably clear. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525

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[6] A Commerce Clause analysis is helpful here because if California's regulation does not substantially affect interstate commerce, *see United States v. Lopez*, 514 U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), then it is obviously outside the scope of the authority delegated by Congress to the FCC. A citizen's personal decision not to disclose private information does not substantially affect interstate commerce and, indeed, may not be commerce at all.

(1977), and cases there cited. No such unmistakable clarity appears here.

The cases generally cited for an expansive reading of the FCC's power to preempt under the Communications Act have all involved state limitations on *interconnection* with the nationwide telecommunications network. *See, e.g., North Carolina Util. Comm'n v. FCC*, 537 F.2d 787, 790 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976), *and other cases cited in Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, text at 374, 375 n. 4 (1986).

Here, however, the privacy protection required by California *in no way* limits interconnection with the nationwide network. *See Air Transport Ass'n v. Pub. Util. Comm'n of California*, 833 F.2d 200, 203, 206 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988), in which both the FCC and the Ninth Circuit expressly found that California privacy regulation applicable to both intrastate and interstate calls did not have a significant impact on federal interconnection requirements.

Moreover, the sole provisions in the Communications Act having anything to do with privacy make clear that state privacy requirements more restrictive than federal requirements are *not* intended to be preempted. *See* 47 U.S.C. §§ 227(e), 605(f).

Finally, California's argument raises the question of whether the Court should infer Congressional intent to authorize the FCC to regulate interstate telecommunications in a way that impinges upon fundamental rights. *See, e.g., Kent v. Dulles*, 357 U.S. 116, 128-130 (1958).

IV. The Asserted Federal Interests are De Minimis

The federal interests asserted by respondents as justifying the FCC's preemption order are: (1) "fostering the availability of . . . CPN-based services on interstate calls to and from California," and (2) "promoting consumer choice." Opp.

8. Neither of these interests is adversely impacted, let alone negated, by California's rule.

The compelled nonconsensual disclosure of nonpublished telephone numbers is not necessary to foster the availability of CPN-based services to and from California. First, California's blocking rules are inapplicable on interstate calls *to* California, and California carriers have publicly committed themselves to offering Caller ID service in the state and have begun signing up customers.[7]

Second, the use of California's per line blocking default on interstate calls *from* California will have little or no effect on the availability of CPN-based services *nationwide*. The FCC's assertion that the development and profitability of Caller ID services *nationwide* is impaired by California's mechanism to protect the privacy of its citizens rests on its statement that "[i]n 1993, California accounted for more than 36 billion interstate calling minutes." Pet. App. A138 n. 124, *citing Statistics of Communications Common Carriers* (FCC, 1994), at p. 22. The misleading nature of the FCC's claim is confirmed by looking at its source. *See* Appendix ("App.") hereto.

While the FCC's table does suggest that California accounted for more than 36 billion interstate telephone call minutes in 1993 – approximately 10.4 percent of the indicated national total – an analysis focusing on the telephone call minutes that involve California's default rule confirms that *only 1.25 percent* of interstate minutes nationwide involve the "safety net" protection of California's per line blocking

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[7] Having expended the sunk costs of CPN blocking and education in order to comply with the FCC's requirement of CPN passage, the deployment of highly lucrative Caller ID service at this juncture is essentially without cost to the carriers.

default.[8] California's default rule hardly constitutes the *negation* of federal interstate policy asserted by respondents.

Indeed, the most striking statistic derived from the FCC's table is that in 1993, there were nearly twice as many *intrastate* telephone calls made in California (68+ billion) as there were *interstate* telephone calls made in *the entire United States* (38+ billion)! A denial of certiorari would plainly leave a very thin interstate tail wagging a very substantial intrastate dog.

Similarly, respondents' second asserted federal interest – promoting customer choice – is in no way negated by California's default rule. The FCC's requirement that per line blocking be subject to a *82 override feature "ensures the free transmission of CPN on a per call basis, at the election of the calling party," Pet. App. A134, and "preserves a consumer's ability to choose when to reveal and when to conceal CPN," *id.* Accordingly, the *82 override feature and California's requirement granting all customers one free change of blocking option on request, Pet. App. A215-A216, ensure that anyone with actual awareness of CPN disclosure and blocking will have a choice. California's default is necessary, however,

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[8] The figure cited by the FCC refers to minutes on both *originating* and *terminating* calls. App. 2. However, since California's blocking regime *only* applies to calls *originating* in California, the figure is significantly overstated. If it is reasonably assumed that 50 percent of the interstate minutes involve originating interstate calls, then *only 5.1 percent* of the nation's interstate minutes involve California's blocking regime. Moreover, since 50 percent of California's residential customers are nonpublished customers, it is reasonable to assume that *only 2.5 percent* of the nation's interstate minutes involve calls initiated by such customers. Finally, if it is assumed that that 50 percent of nonpublished subscribers are informed about disclosure and blocking and consequently either communicate a choice of blocking option to the telephone company or make a choice by letting the default of which they are aware take effect, then *only 1.25 percent* of interstate minutes nationwide involve the "safety net" protection of California's per line blocking default for nonpublished customers.

to protect the right to choose of nonpublished subscribers without such awareness.

Respondents make much of the FCC's supposed balancing of the interests of called parties against the interests of calling parties, Opp. 2, 8, but they ignore the fact that the advent of Caller ID alters the *status quo* by *increasing* the privacy of called parties while *decreasing* the privacy of calling parties. Pet. App. A195. Respondents' statement that "California's default policy would upset that balance, depriving the called party of the benefits of caller ID even though the calling party had made no affirmative choice to block transmission of its CPN," Opp. 9, simply ignores the issue. Respondents have never explained why federal policy requires the surreptitious appropriation and disclosure to the general public of the nonpublished telephone numbers of American citizens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM STATISTICS OF COMMUNICATIONS COMMON CARRIERS (FCC, 1994), AT PAGE 22, CITED BY THE FCC IN ITS RECONSIDERATION ORDER, PET. APP. A138 N. 124

STATISTICS OF COMMUNICATIONS COMMON CARRIERS

(LOGO)

Federal Communications Commission
1993/1994 Edition

TABLE 2.6 – TELEPHONE CALLS AND MINUTES FOR REPORTING LOCAL EXCHANGE COMPANIES – YEAR ENDED DECEMBER 31, 1993
(FIGURES SHOWN IN THOUSANDS)

STATE	LOCAL CALLS	INTRALATA TOLL CALLS COMPLETED (ORIGI-NATING)	INTERLATA TOLL CALLS COMPLETED (ORIGINATING)			INTERLATA BILLED ACCESS MINUTES (ORIGINATING AND TERMINATING)		
			INTERSTATE	INTRASTATE	TOTAL	INTERSTATE	INTRASTATE	TOTAL
CALIFORNIA	55,516,432	8,463,610	5,407,552	4,069,140	9,476,691	36,488,037	25,705,197	62,193,234
UNITED STATES	444,710,879	23,437,234	38,679,958	15,317,747	53,997,703	349,553,992	114,247,769	463,801,783